

By: Representative Holden

To: Judiciary A

HOUSE BILL NO. 829

1 AN ACT TO AMEND THE MISSISSIPPI BUSINESS CORPORATION ACT; TO
 2 AMEND SECTION 79-4-8.30, MISSISSIPPI CODE OF 1972, TO REVISE THE
 3 STANDARD OF CONDUCT FOR DIRECTORS; TO CODIFY SECTION 79-4-8.31,
 4 MISSISSIPPI CODE OF 1972, TO REVISE THE STANDARDS OF LIABILITY FOR
 5 DIRECTORS; TO AMEND SECTION 79-4-8.33, MISSISSIPPI CODE OF 1972,
 6 TO REVISE THE LIABILITY OF DIRECTORS FOR UNLAWFUL DISTRIBUTIONS;
 7 TO AMEND SECTION 79-4-8.42, MISSISSIPPI CODE OF 1972, TO REVISE
 8 THE STANDARD OF CONDUCT FOR OFFICERS; AND FOR RELATED PURPOSES.

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

10 SECTION 1. Section 79-4-8.30, Mississippi Code of 1972, is
 11 amended as follows:

12 79-4-8.30. (a) Each member of the board of directors, when
 13 discharging the duties of a director, shall act:

14 (1) In good faith, and

15 * * *

16 (2) In a manner the director reasonably believes to be
 17 in the best interests of the corporation.

18 (b) The members of the board of directors or a committee of
 19 the board, when becoming informed in connection with their
 20 decision-making function or devoting attention to their oversight
 21 function, shall discharge their duties with the care that a person
 22 in a like position would reasonably believe appropriate under
 23 similar circumstances.

24 (c) In discharging board or committee duties a director, who

25 does not have knowledge that makes reliance unwarranted, is
26 entitled to rely on the performance by any of the persons
27 specified in subsection (e)(1) or subsection (e)(3) to whom the
28 board may have delegated, formally or informally by course of
29 conduct, the authority or duty to perform one or more of the
30 board's functions that are delegable under applicable law.

31 (d) In discharging board or committee duties a director, who
32 does not have knowledge that makes reliance unwarranted, is
33 entitled to rely on information, opinions, reports or statements,
34 including financial statements and other financial data, prepared
35 or presented by any of the persons specified in subsection (e).

36 (e) A director is entitled to rely, in accordance with
37 subsection (c) or (d), on:

38 (1) One or more officers or employees of the
39 corporation whom the director reasonably believes to be reliable
40 and competent in the functions performed or the information,
41 opinions, reports or statements provided;

42 (2) Legal counsel, public accountants, or other persons
43 retained by the corporation as to matters involving skills or
44 expertise the director reasonably believes are matters (i) within
45 the particular person's professional or expert competence or (ii)
46 as to which the particular person merits confidence; or

47 (3) A committee of the board of directors of which the
48 director is not a member if the director reasonably believes the
49 committee merits confidence.

50 (f) For purposes of this section, a director, in
51 determining what he reasonably believes to be in the best
52 interests of the corporation, shall consider the interests of the
53 corporation's shareholders and, in his discretion, may consider
54 any of the following:

55 (1) The interests of the corporation's employees,

56 suppliers, creditors and customers;

57 (2) The economy of the state and nation;

58 (3) Community and societal considerations;

59 (4) The long-term as well as short-term interests of
60 the corporation and its shareholders, including the possibility
61 that these interests may be best served by the continued
62 independence of the corporation.

63 * * *

64 SECTION 2. The following provision shall be codified as
65 Section 79-4-8.31, Mississippi Code of 1972:

66 79-4-8.31. (a) A director shall not be liable to the
67 corporation or its shareholders for any decision to take or not to
68 take action, or any failure to take any action, as a director,
69 unless the party asserting liability in a proceeding establishes
70 that:

71 (1) Any provision in the articles of incorporation
72 authorized by Section 2.02(b)(4) or the protection afforded by
73 Section 8.61 for action taken in compliance with Section 8.62 or
74 8.63, if interposed as a bar to the proceeding by the director,
75 does not preclude liability; and

76 (2) The challenged conduct consisted or was the result
77 of:

78 (i) Action not in good faith; or

79 (ii) A decision

80 1. Which the director did not reasonably
81 believe to be in the best interests of the corporation, or

82 2. As to which the director was not informed
83 to an extent the director reasonably believed appropriate in the

84 circumstances; or

85 (iii) A lack of objectivity due to the director's
86 familial, financial or business relationship with, or a lack of
87 independence due to the director's domination or control by,
88 another person having a material interest in the challenged
89 conduct:

90 1. Which relationship or which domination or
91 control could reasonably be expected to have affected the
92 director's judgment respecting the challenged conduct in a manner
93 adverse to the corporation, and

94 2. After a reasonable expectation to such
95 effect has been established, the director shall not have
96 established that the challenged conduct was reasonably believed by
97 the director to be in the best interests of the corporation; or

98 (iv) A sustained failure of the director to be
99 informed about the business and affairs of the corporation, or
100 other material failure of the director to discharge the oversight
101 function; or

102 (v) Receipt of a financial benefit to which the
103 director was not entitled or any other breach of the director's
104 duties to deal fairly with the corporation and its shareholders
105 that is actionable under applicable law.

106 (b) The party seeking to hold the director liable:

107 (1) For money damages, shall also have the burden of
108 establishing that:

109 (i) Harm to the corporation or its shareholders
110 has been suffered, and

111 (ii) The harm suffered was proximately caused by

112 the director's challenged conduct; or

113 (2) For other money payment under a legal remedy, such
114 as compensation for the unauthorized use of corporate assets,
115 shall also have whatever persuasion burden may be called for to
116 establish that the payment sought is appropriate in the
117 circumstances; or

118 (3) For other money payment under an equitable remedy,
119 such as profit recovery by or disgorgement to the corporation,
120 shall also have whatever persuasion burden may be called for to
121 establish that the equitable remedy sought is appropriate in the
122 circumstances.

123 (c) Nothing contained in this section shall (1) in any
124 instance where fairness is at issue, such as consideration of the
125 fairness of a transaction to the corporation under Section
126 8.61(b)(3), alter the burden of proving the fact or lack of
127 fairness otherwise applicable, (2) alter the fact or lack of
128 liability of a director under another section of this act, such as
129 the provisions governing the consequences of an unlawful
130 distribution under Section 8.33 or a transactional interest under
131 Section 8.61, or (3) affect any rights to which the corporation or
132 a shareholder may be entitled under another statute of this state
133 or the United States.

134 SECTION 3. Section 79-4-8.33, Mississippi Code of 1972, is
135 amended as follows:

136 79-4-8.33. (a) A director who votes for or assents to a
137 distribution in excess of what may be authorized and made pursuant
138 to Section 79-4-6.40(a) * * * is personally liable to the
139 corporation for the amount of the distribution that exceeds what

140 could have been distributed without violating Section 79-4-6.40(a)
141 if the party asserting liability establishes that when taking the
142 action the director did not comply with Section 79-4-8.30. * * *

143 (b) A director held liable under subsection (a) for an
144 unlawful distribution is entitled to * * *:

145 (1) Contribution from every other director who could be
146 held liable under subsection (a) for the unlawful distribution;
147 and

148 (2) Recoupment from each shareholder of the pro rata
149 portion of the amount of the unlawful distribution the shareholder
150 accepted, knowing the distribution was made in violation of
151 Section 79-4-6.40(a) * * *.

152 (c) A proceeding to enforce:

153 (1) The liability of a director under subsection (a) is
154 barred unless it is commenced within two (2) years after the date
155 on which the effect of the distribution was measured under Section
156 79-4-6.40(e) or (g) or as of which the violation of Section
157 79-4-6.40(a) occurred as the consequence of disregard of a
158 restriction in the articles of incorporation; or

159 (2) Contribution or recoupment under subsection (b) is
160 barred unless it is commenced within one (1) year after the
161 liability of the claimant has been finally adjudicated under
162 subsection (a).

163 SECTION 4. Section 79-4-8.42, Mississippi Code of 1972, is
164 amended as follows:

165 79-4-8.42. (a) An officer, when performing in such
166 capacity, shall act:

167 (1) In good faith;

168 (2) With the care that a person in a like position
169 would reasonably exercise under similar circumstances; and

170 (3) In a manner the officer reasonably believes to be
171 in the best interests of the corporation.

172 (b) In discharging those duties an officer, who does not
173 have knowledge that makes reliance unwarranted, is entitled to
174 rely on * * *:

175 (1) The performance of properly delegated
176 responsibilities by one or more * * * employees of the corporation
177 whom the officer reasonably believes to be reliable and competent
178 in performing the responsibilities delegated; or

179 (2) Information, opinions, reports or statements,
180 including financial statements and other financial data, prepared
181 or presented by one or more employees of the corporation whom the
182 officer reasonably believes to be reliable and competent in the
183 matters presented or by legal counsel, public accountants, or
184 other persons retained by the corporation as to matters involving
185 skills or expertise the officer reasonably believes are matters
186 (i) within the particular person's professional or expert
187 competence or (ii) as to which the particular person merits
188 confidence.

189 * * *

190 SECTION 5. This act shall take effect and be in force from
191 and after July 1, 1999.